Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1986

RUBY APPELMAN, et al.,
Petitioners,

v.

GEORGE BEACH, Assessor of Bernalillo County, TIMOTHY EICHENBERG, Treasurer of Bernalillo County, and BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Hunter L. Geer
HUNTER L. GEER, P.A.
130 Louisiana Boulevard, N.E.
Albuquerque, New Mexico 87108
(505) 266-5501
Counsel for Respondents.

Thomas L. Grisham
McCULLOCH, GRISHAM & LAWLESS, P.A.
Sandra A. Grisham
200 Lomas, N.W., Suite 400
Albuquerque, New Mexico 87102
(505) 247-1401
Counsel for Petitioners

September 2, 1980

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GEORGE BEACH, Assessor of Bernalillo County, TIMOTHY EICHENBERG, Treasurer of Bernalillo County, and BOARD OF COUNTY COMMISSIONERS OF BERNALILLO COUNTY,
Respondents.

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Respondents herein respectfully request that the Petition for a Writ of Certiorari requested herein to review the Opinion of the New Mexico Supreme Court be denied. The Opinion is cited as *Appelman v. Beach*, ---N.M. ---, 608 P.2d 1119 (1980).

JURISDICTION

Petitioners seek a review of the New Mexico Supreme Court's decision. Rule 19(1) (a) of the Supreme Court Rules, 28 U.S.C.A. (Rules) provides for a review of a Writ of Certiorari on questions arising:

> Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

Rule 19 states that a review on Writ of Certiorari is

not a matter of right, but is a question of sound judicial discretion.

QUESTION PRESENTED

The Petitioners, Plaintiffs below, sought a refund of a portion of their property taxes for the years 1976 and 1977, alleging the Defendants had appraised their property at full market value under a reappraisal program which began in 1974 and continued to the 1977 tax year, and which was ongoing in nature. The reappraisal for the 1977 schedule was placed on the tax rolls, but because of the enactment of legislation the property appraisals were reduced to the 1976 appraisal plus 10%. §7-36-17, N.M.S.A. 1978 (Repealed) Appendix "A", p. 11.

The trial court declared the statute unconstitutional and ordered the County Assessor to continue and promptly complete the reappraisal program, and for the County Commissioners to fund such a program. (Petitioners' Brief, Appendix "D", p. 33).

The New Mexico Supreme Court stated in its Opinion that only when fraud or systematic discrimination are present does the inequitable taxation give rise to a constitutional claim. (Petitioners' Brief, Appendix "B", p. 28).

The QUESTION PRESENTED is whether the United States Constitution requires a remedy of refund or damages when there was no pleading of nor showing of fraud or systematic discrimination.

STATUTES INVOLVED

Section 7-36-17, N.M.S.A. 1978; *see* Appendix "A", p. 11.

STATEMENT OF THE CASE

Taxpayers sought a refund of *ad valorem* taxes paid to Bernalillo County, New Mexico, for the years 1976 and 1977. The statute of limitations had run for the filing of a refund for 1976 taxes. (Petitioners' Brief, Appendix "F", p. 35). The County had commenced a reappraisal program in 1974; the reappraisal for 1977 tax rolls was not used because of §7-36-17, N.M.S.A. 1978 (Repealed). The Petitioners filed the claim for refund in the District Court of Bernalillo County, New Mexico, on December 14, 1977.

The trial court was asked to roll back the appraisal, and thereafter limit the taxes or the increase thereon to 10% for each year thereafter. This would in effect provide relief to the taxpayers who were claiming that their property had been reappraised and placed on the tax rolls prior to the completion of the reappraisal program.

The trial court stated:

> Any method of evaluation for tax purposes which requires that some properties be placed upon the tax rolls at full market value but limits the ability of the County to place all the properties on the tax rolls at full market value would be unconstitutional.
>
> Therefore, the only relief the Court can give is to order that all properties be placed upon the tax rolls at the same percentage of market value. The legislature, in its wisdom, has determined that to be 100 percent, therefore, the only possible relief that this Court can grant at any stage of this case is to order the County Assessor to promptly complete the overall reappraisal of Bernalillo County and keep it current on an ongoing basis in order to assure that properties are placed and kept reasonably current on the tax rolls at 100 percent of market value.

In affirming the lower court, the New Mexico Supreme Court stated:

> This Court reiterated the *Skinner* holding in 1979 in *Ernest W. Hahn, Inc. v. County Assessor, Etc.*, 92 N.M. 609, 592 P.2d 965 (1978). Although we realize that Appelman has been paying higher property taxes than other Bernalillo County property owners for a number of years, in *Hahn* we stated: "[t]emporary inequalities which result from the practicalities of carrying out a county-wide systematic and definite property appraisal program are inevitable and constitutional. This rule is universally accepted." *Id.* at 612, 592 P.2d at 968. *See Hamilton v. Adkins*, 250 Ala. 557, 35 So.2d 183 (1948), *cert. denied*, 335 U.S. 861 (1948); *Maricopa County v. North Central Dev. Co.*, 115 Ariz. 540, 566 P.2d 688 (Ct. App. 1950); *Larson v. State*, 166 Mont. 499, 534 P.2d 854 (1975).

The Supreme Court of New Mexico found the remedy afforded the taxpayer to be correct.

The Opinion of the Supreme Court of New Mexico correctly decided a federal question, and decided it consistent with the appropriate decisions of this Court.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

Petitioners cite no cases wherein damages were awarded or taxes refunded to those adversely affected by an ongoing though incompleted tax equalization or reappraisal program. The Supreme Court of the State of New Mexico afforded Petitioners their proper remedy by affirming the lower court order that the reappraisal program be promptly completed. Petitioners rely primarily upon two United States Supreme Court cases easily distinguished, and a New Mexico Supreme Court case consistent with the judgment in the present case.

Petitioners rely first upon *Sioux City Bridge Company v. Dakota County, Nebraska*, 260 U.S. 441 (1923), wherein the owners of a bridge were taxed upon the bridge's full value while other property in the district was taxed at fifty-five percent of its value. The United States Supreme Court rejected the Supreme Court of Nebraska ruling that the bridge owners' redress was to have other property in the taxing district taxed at full value: "such a result . . . is to deny the injured taxpayer any remedy at all because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district." *Id.* at 446.

In the present controversy it was indeed possible for Petitioners to secure increased assessments, and such relief the Supreme Court of New Mexico granted. It should further be noted that in *Sioux City* an individual piece of property was alone reassessed at full value, while Petitioners' properties were reassessed as part of a comprehensive program. Finally, the United States Supreme Court in *Sioux City* did not grant damages or a tax refund as Petitioners here seek.

The other United States Supreme Court case relied upon by Petitioners is *Township of Hillsborough v. Cromwell*, 326 U.S. 620 (1946). An individual taxpayer prayed that certain tax assessments be invalidated because she allegedly had been systematically singled out for discriminatory treatment. The Supreme Court affirmed the granting of such relief, holding that a taxpayer intentionally discriminated against should not be imposed upon to seek upward revision of the taxes of others. In *Hillsborough*, as in *Sioux City*, one or a few individual taxpayers were taxed at higher rates than other members

of the class for no legitimate reason. Petitioners here number one thousand forty-seven and paid higher rates merely because they and others were the first of the class to be affected by a comprehensive reappraisal program (Petitioners' Appendix "A", p. 14).

The tax assessment in *Hillsborough* was invalidated because of the presence of intentional, systematic "discrimination" as that term is employed in connection with the equal protection clause of the Fourteenth Amendment. See *id.* at 623. Petitioners contend that the New Mexico Supreme Court found such discrimination when it reprimanded public officials in charge of the reappraisal program for permitting "manifest discrimination." (See Petitioners' Appendix "C", p. 28).

Although perhaps an unfortunate word choice, the court clearly referred to "discrimination" in a generic sense and not in a manner recalling the equal protection clause. Two paragraphs previously, the court had noted that "[o]nly when fraud or systematic discrimination are present . . . does the inequitable taxation give rise to a constitutional claim." (Petitioners' Appendix "C", p. 28). Moreover, Petitioners did not even plead "fraud [or] intentional discrimination." (Petitioners' Appendix "C", p. 27). Thus, they are ineligible for the remedy prescribed in *Hillsborough*.

Petitioners, finally, argue for entitlement to damages or a refund from *Skinner v. New Mexico State Tax Commission*, 66 N.M. 221, 345 P.2d 750 (1959), a case somewhat similar to the present one. The New Mexico Supreme Court there found an incompleted tax equalization program constitutionally sound based on the "presumption that tax officials will do their duty," and that the program

would proceed expeditiously. "In the event there is a failure to so continue, appellants would be fully justified in taking such action as might be required to force a corresponding revaluation of all of the other property in the county." *Id.* at 225-26, 345 P.2d 750, 753.

Petitioners offer that the reappraisal program in the present case was discontinued, that they had sought redress as *Skinner* counsels, yet were afforded no relief. In fact, Petitioners were granted the relief *Skinner* foresaw — an order to reappraise the rest of the county.

Further, Petitioners seek to infer that the reappraisal program was discontinued; the reappraisal program was an ongoing program to the January 1, 1978 tax rolls (Appendix "B", p. 13).

The weakness of Petitioners' argument and the inapplicability of their authorities point to the propriety of the New Mexico Supreme Court's judgment in *Appelman v. Beach* (Petitioners' Appendix "C", p. 23). *Appelman* stands together with decisions by this Court and many others, disallowing claims based upon the inevitable temporary inequalities attending tax equalization and reappraisal programs until they are completed. E.g., *Sunday Lake Iron Company v. Township of Wakefield*, 247 U.S. 350 (1918); *Hamilton v. Adkins*, 35 So.2d 183 (Ala. 1948), *cert. denied*, 335 U.S. 861; *Hillock Bade*, 523 P.2d 97 (Ariz. Ct. App. 1974), *aff'd per curiam*, 535 P.2d 130 (1975).

In *Sunday Lake Iron, supra*, a state board raised the assessment on plaintiff's mining property from $65,000 to $1,071,000 pursuant to a legislative act to reassess all mining properties. Due to a lack of time and inadequate information the board did not reappraise other land in

that year, although land was generally assesed at not more than one-third its actual value. Because the board's action was "not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal," the taxpayer was denied relief. *Id.* at 353. The Court stated:

> . . . mere errors of judgment of officials will not support a claim of discrimination. There must be something more — something which in effect amounts to an intentional violation of the essential principal of practical uniformity. *Id.*

The New Mexico Supreme Court noted that Petitioners here did not even plead "intentional discrimination." (Petitioners' Appendix "C", p. 27). When the New Mexico Supreme Court "condemned" reappraisal program officials "for permitting such manifest discrimination," it was merely reprimanding the officials for something akin to "mere errors of judgment." It was not declaring the existence of an intentional, systematic discrimination at odds with the equal protection clause of the Fourteenth Amendment.

The Court, in one case relied upon by Petitioners, *Sioux City Bridge Company v. Dakota County, Nebraska,* 260 U.S. 441 (1923), would not insist that an aggrieved taxpayer, not a victim of intentional discrimination, seek to have all other properties reappraised upward. In that case there was no program already in place to achieve such an end.

In the other Supreme Court case relied on by Petitioners, *Township of Hillsborough v. Cromwell,* 326 U.S. 620 (1946), this Court invalidated certain tax assessments. In that case an intentional, systematic discrimination was

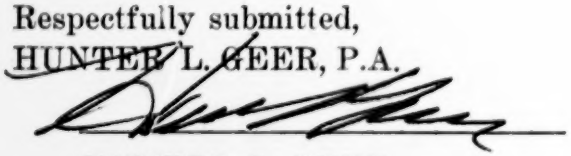
found. In this case there was no intentional discrimination and there was a reappraisal program in existence. The New Mexico Supreme Court correctly found the assessments valid and properly ordered the prompt completion of the reappraisal program to redress the Petitioners.

In *Hamilton v. Adkins*, 35 So.2d 183 (Ala. 1948), *cert. denied*, 335 U.S. 861, the Alabama Supreme Court held, in the context of a four year reappraisal program, that no violation of constitutional principles of equality and uniformity of taxation existed. Although temporary inequalities existed, as here, in the absence of a showing of intentional, systematic discrimination, the assessments were valid. This Court denied the application for Writ of Certiorari in that case and should do so in this case.

CONCLUSION

For the reasons stated above, Respondent respectfully submits that a Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
HUNTER L. GEER, P.A.



HUNTER L. GEER
Attorney for Respondents
130 Louisiana Boulevard, N.E.
Albuquerque, New Mexico 87108
(505) 266-5501

I, Hunter L. Geer, Attorney for the Respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing Response to the Petition for a Writ of Certiorari to the Supreme Court of New Mexico on the Petitioners

herein by mailing copies in duly addressed envelopes, with first class postage prepaid, to their attorney of record for the Petitioners as follows:

To: Thomas L. Grisham, Esq.
Counsel to Petitioners
McCulloch, Grisham and Lawless, P.A.
200 Lomas Blvd., N.W., Suite 400
Albuquerque, New Mexico 87102

To: Sandra A. Grisham
Counsel to Petitioners
P. O. Box 750
Alamogordo, New Mexico 88310

Dated this 28th day of August, 1980.

HUNTER L. GEER
Attorney for Respondents
130 Louisiana Boulevard, N.E.
Albuquerque, New Mexico 87108
(505) 266-5501

Appendix A

Section 7-36-17, N.M.S.A., 1978. *Limitations.* Limitation on increases in valuation of certain property for property taxation purposes.[1]

A. The limitation upon increases in valuation of property for property taxation purposes provided in Subsection B of this section shall apply only to property that is valued for property taxation purposes under Subsection B of Section 72-29-5 N.M.S.A. 1953 using the market value as determined by sales of comparable property method of valuation.[2]

B. For property described in Subsection A of this section, its value for property taxation purposes in a property tax year shall not exceed the value determined for it in the previous property tax year by an amount equal to ten percent of the value determined for that previous property tax year.

C. The limitation on property value increase described in Subsection B of this section shall not apply to any increase in valuation from the preceding property tax year arising from:

(1) the addition of improvements, whether by declaration of the property owner or user or any other action including the action of a county assessor to add previously omitted improvements, or the remodeling or renovation of existing improvements;

(2) any rezoning or similar action of a governmental body that results in a change of permitted use of the property;

(3) division of the property into two or more parcels for any purpose; or

(4) any other factor resulting in an increase in value other than appreciation resulting from market conditions.

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[1] Formerly codified as §72-29-6.1, N.M.S.A. 1953 (1976-77 Interim Supp.); Repealed, 1979, New Mexico Laws, Ch. 268, §3.

[2] See Appendix E, page 34, Petitioners' Brief for full text of Subsection B of Section 72-29-5, N.M.S.A. 1953.

APPENDIX B

STATE OF NEW MEXICO
COUNTY OF BERNALILLO

IN THE DISTRICT COURT

RUBY APPELMAN, et al.,
Plaintiffs,

vs. No. 24296 - Tax Case

GEORGE BEACH, et al.,
Defendants.

STIPULATION

The parties stipulate to the following facts:

1. Group A and Group C Plaintiffs are those named individually in Exhibit A, C of Plaintiffs Complaint.

2. Group B Plaintiffs are those unnamed individuals whose property is located in Bernalillo County, New Mexico, in the areas listed by section numbers of the Uniform Property Code in Exhibit B of Plaintiffs' Complaint, and which property was revalued during the Countywide revaluation program which began in late 1974, and placed on the 1977 tax roll at full market value.

3. Group A, B, and C Plaintiffs failed to file suit as required by Section 72-31-39 and 40 N.M.S.A., 1953 Comp. (1975 Supp.) as to 1976 property tax refunds.

4. Plaintiffs ask for no relief for taxes for 1975 and prior years.

5. Group A Plaintiffs' property was reappraised in 1975 and 1976 and was placed on the tax rolls of Bernalillo County of January 1, 1977, at their market value as determined by the assessment pursuant to the reappraisal program.

6. Group C Plaintiffs were placed on the tax rolls at full market value for 1977.

7. District Judge Phillip Baiamonte conducted no hear-

ing on December 15, 1977, prior to signing the Order joining Group B Plaintiffs involuntarily.

8. The County had reappraised approximately 30,000 parcels of property between 1974 and 1977.

9. The Plaintiffs' properties had been placed on the tax rolls of Bernalillo County at the reappraised values for taxes assessed and collected for the calendar year 1977.

10. Defendant's reappraisal program commenced in late 1974 was targeted for completion over a four year period and said program was to be ongoing in nature and was in fact ongoing as of December 31, 1976. The parties dispute whether the program was abandoned after December 31, 1976.

11. Approximately 27,000 parcels of property which had been reappraised in 1976 under the reappraisal program started in 1974, were put on the tax rolls at full value on January 1, 1977. By order of the Property Tax Department, these properties were reduced on the tax rolls to not more 1976 appraisal value plus 10%.

12. Approximately 8,000 parcels of property which had been reappraised under the reappraisal program which started in 1974 were placed on the tax rolls on January 1, 1978, at no more than that prior value plus 10%.

13. No other properties were reappraised pursuant to the reappraisal program and placed on the tax rolls of Bernalillo County at their new full appraisal value on either January 1, 1977, or January 1, 1978.

APPROVED:
SANDRA A. GRISHAM
Attorney for Plaintiffs
/s/Hunter L. Geer
HUNTER L. GEER
Attorney for Defendants
APPROVED:
/s/Gerald R. Cole
GERALD R. COLE
District Judge

I hereby stipulate to the above facts, without, however, waiving any of the Plaintiffs' Requested Findings of Fact and without stipulating that the above facts are sufficient facts upon which to render a decision regarding the affirmative defenses.

/s/Sandra A. Grisham
SANDRA A. GRISHAM
Attorney for Plaintiffs
3201 Fourth Street, N.W.
Albuquerque, New Mexico 87107
505/345-8494